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BUMBO (PTY) LIMITED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DYLAN LAMM, a minor by and
through his guardian ad litem MARY
CATHERINE DOHERTY; and KEVIN
LAMM,

Plaintiffs,

vs.

BUMBO, BUMBO LIMITED, BUMBO
(PTY) LTD.; TARGET
CORPORATION; and DOES 1 to 20,

Defendants.

Case No. C-07-04807 MHP

**AMENDED NOTICE OF
MOTION AND MOTION TO
QUASH SERVICE, DISMISS FOR
IMPROPER SERVICE, LACK OF
PERSONAL JURISDICTION
AND FAILURE TO SERVE, AND
FOR SANCTIONS;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

Date: March 10, 2008

Time: 2:00 p.m.

Place: Courtroom of the Hon.
Marilyn Hall Patel

PLEASE TAKE NOTICE that on March 10, 2008, at 2:00 p.m., or as soon
thereafter as the matter may be heard, in Courtroom 15, before the Hon. Marilyn
Hall Patel, defendant Bumbo (Pty) Limited shall and hereby does respectfully
move this Court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(2) and
12(b)(5). Bumbo (Pty) Limited further requests sanctions in the amount of \$2,820
against plaintiffs and their attorneys for bad faith conduct in filing the Affidavit of
Service. Bumbo (Pty) Limited's motion is based upon this Amended Notice of

1 Motion and Motion, the following Memorandum of Points and Authorities, the
2 attached Declarations of Jennifer J. Johnston, Jessica Viker and Johan Nicholas
3 Buitendach, the Complaint, and such additional matters as may be judicially
4 noticed or properly come before this Court prior to or at the hearing on this matter.
5

6 Dated: January __, 2008

CONDON & FORSYTH LLP

8 By: s/Jennifer J. Johnston

9 ROD D. MARGO

JENNIFER J. JOHNSTON

10 Attorneys *Specially Appearing* for
11 Defendant BUMBO (PTY) LIMITED

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On January 7, 2008, an Affidavit of Service (“Affidavit”) was filed by plaintiffs’ attorneys in this action. This Affidavit purported service of process on “Bumbo Limited,” a non-existent business entity. As it is unclear whether plaintiffs are purporting to have served defendant Bumbo (Pty) Limited, Bumbo (Pty) Limited is bringing this motion to quash service for lack of personal jurisdiction and failure to serve and for sanctions.

“Bumbo Limited,” the defendant allegedly served in this action, does not exist.¹ Plaintiffs claim that they have successfully served “Bumbo Limited” in Conroe, Texas. The moving defendant, Bumbo (Pty) Limited, is the only entity named as a defendant which is an actual legal entity. Plaintiffs have failed to effectively serve Bumbo (Pty) Limited, and this Court lacks personal jurisdiction over Bumbo (Pty) Limited.

Bumbo (Pty) Limited is a South African corporation which manufactures a product called the “Baby Sitter.” Bumbo (Pty) Limited’s office and manufacturing facilities are located in South Africa. Plaintiffs purported to serve “Bumbo Limited” by serving Mark Buchanan, who is believed to be an officer of Wartburg Enterprises, Inc., a Florida corporation with its principal place of business in Texas.² (See Affidavit.)

Wartburg Enterprises, Inc. is a distributor of the “Baby Sitter.” Because neither Mark Buchanan nor Wartburg Enterprises, Inc. is an agent for service of

¹ Plaintiffs have also allegedly sued “Bumbo,” another non-existent defendant, but, to moving party’s knowledge, plaintiffs have yet to attempt to serve “Bumbo” in this action. Plaintiff has, however, purported to serve “Bumbo” in the case of *Whitson v. Bumbo*, et al., Case No. C-07-05597, also venued in this court. The purported service in the *Whitson* action is also the subject of a motion to quash/motion to dismiss, scheduled for hearing on February 21, 2008.

² In the *Whitson* matter, referenced above, plaintiff purportedly served Dione Buchanan, Mark Buchanan’s wife, as “owner” of Bumbo. In this case, Mark Buchanan was purportedly served as owner of “Bumbo Limited.”

Bumbo (Pty) Limited and neither are authorized to accept service of process on its behalf, Bumbo (Pty) Limited has yet to be properly served, and its motion to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(5) should be granted.

Further, Bumbo (Pty) Limited seeks dismissal of the action based on the absence of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Bumbo (Pty) Limited is not subject to general or specific personal jurisdiction in California.

Finally, Bumbo (Pty) Limited seeks sanctions against plaintiffs and plaintiffs' attorneys for vexatiously and unreasonably multiplying the proceedings in this action and necessitating this motion.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Dylan Lamm, Mary Catherine Doherty, and Kevin Lamm, all California residents³, allege that on May 23, 2007, Kevin Lamm placed then six month old Dylan, into the Bumbo Baby Sitter ("Baby Sitter") on a table top. Plaintiffs further allege that while seated in the Baby Sitter, Dylan fell out of the Baby Sitter and was injured. Plaintiffs allege that the Baby Sitter was received as a gift in May 2007, from an unnamed "friend," who purchased the item at a Target store in Sonoma County, California.

Plaintiffs have sued Bumbo, Bumbo Limited, Bumbo (Pty) Ltd. and Target Corporation to recover damages for the personal injuries Dylan allegedly sustained.⁴

Target has appeared in this action and has not contested the Court's jurisdiction as to the claims against it and is defending the action on its merits.

³ Mary Catherine Doherty and Kevin Lamm are the parents of the minor child, Dylan Lamm.

⁴ This motion is brought on behalf of defendant Bumbo (Pty) Limited. As discussed above, Bumbo (Pty) Limited has no knowledge, ownership or control of purported business entities "Bumbo" or "Bumbo Limited," and believes that these are nonexistent entities.

1 On December 27, 2007, plaintiffs purportedly attempted to serve “Bumbo
 2 Limited” by serving Mark Buchanan, ostensibly as “owner” of “Bumbo Limited”
 3 at 12248 Fm 1485, Conroe, TX 77306. (See Affidavit).⁵ Mark Buchanan is not an
 4 “owner” of Bumbo (Pty) Limited. Mark Buchanan also is not an officer, director,
 5 managing agent or employee of Bumbo (Pty) Limited. Bumbo (Pty) Limited has
 6 no office or place of business at 12248 FM 1485, Conroe, Texas. Mark Buchanan
 7 further is not authorized to accept service on behalf of Bumbo (Pty) Limited.
 8 (Declaration of Johan Nicholas Buitendach (“Buitendach Decl.”), ¶27).

9 Bumbo (Pty) Limited is a corporation that is domiciled and existing under
 10 the laws of South Africa. (See Complaint, ¶3; Buitendach Decl., ¶4.) Bumbo (Pty)
 11 Limited’s principal place of business is in Pretoria, South Africa. (Buitendach
 12 Decl., ¶4.) Bumbo (Pty) Limited does not have an office or employees at the
 13 address where service allegedly occurred. (*Id.* at ¶28.) Bumbo (Pty) Limited also
 14 does not have any corporate offices, warehouses or manufacturing facilities in
 15 Texas, California, or any other location in the United States. (*Id.* at ¶9.) Bumbo
 16 (Pty) Limited is not registered or licensed to do business in Texas, California, or
 17 any other location in the United States. (*Id.* at ¶11.)

18 Bumbo (Pty) Limited is informed and believes that one of the distributors of
 19 the Baby Sitter in the United States, Wartburg Enterprises, Inc., maintains a facility
 20 at the address where service was purportedly affected. (*Id.* at ¶25.) Wartburg
 21 Enterprises, Inc. is not a “Bumbo” entity and is a corporation separate and distinct
 22 from Bumbo (Pty) Limited. Wartburg Enterprises, Inc. is incorporated in the state
 23 of Florida with its principal place of business in Texas. Wartburg Enterprises, Inc.
 24 also is not an agent for service of process for Bumbo (Pty) Limited. (*Id.* at ¶¶ 21-

25
 26 ⁵ At the risk of appearing repetitious, according to the Affidavit, only a defendant named
 27 “Bumbo Limited” was allegedly served. “Bumbo Limited” does not exist. Thus, it is unclear at
 this time whether plaintiffs were even attempting to serve Bumbo (Pty) Limited. For the
 purposes of this motion, moving party assumes this to be the case.

28.) (See also Exhibit “D” to Declaration of Jennifer J. Johnston (“Johnston Decl.”).)

In November 2007, Bumbo (Pty) Limited learned through Target that a lawsuit had been filed against Target and Bumbo (Pty) Limited. (Johnston Decl., ¶2.) Bumbo (Pty) Limited initially retained Condon & Forsyth LLP (“C & F”) to monitor the court docket. (*Id.* at ¶4.) Bumbo (Pty) Limited had no information that it had been served, but it learned through Target that plaintiffs’ attorneys were claiming that they had served “Bumbo.” (*Id.* at ¶3.) Bumbo (Pty) Limited requested C & F to contact plaintiffs’ attorneys and request information about the purported service. (*Id.* at ¶5.)

On November 15, 2007, C & F sent a letter to plaintiffs’ attorneys requesting information regarding the purported service of the summons and complaint. The letter further requested that plaintiffs’ attorneys advise C & F before a default was requested. (*Id.* at ¶6; See Exhibit “A” to Johnston Decl.)

In response, C & F received a letter dated November 21, 2007, from plaintiffs’ attorneys refusing to provide C & F with any information regarding service or to “enter into any agreements” with C & F. (*Id.* at ¶7; See Exhibit “B” to Johnston Decl.) C & F then sent another letter to plaintiffs’ attorneys advising that C & F had no information regarding any service on Bumbo (Pty) Limited and further requesting that they “refrain from any attempts to take a default judgment against Bumbo.” (*Id.* at ¶8; See Exhibit “C” to Johnston Decl.)

In addition, multiple telephone calls were made from C & F to the office of plaintiffs’ attorneys during the months of November and December 2007, requesting information on service. (See Declaration of Jessica Viker (“Viker Decl.”), ¶2.) C & F first spoke to Jeremy R. Fietz who advised that he had no knowledge of the case and that Mr. Edgar would be the person with whom to speak. (*Id.* at ¶3.) Despite leaving a message for Mr. Edgar, C & F never received

1 a return phone call. (*Id.* at ¶4.) C & F then elected to telephone Mr. Edgar again
 2 who then stated that “Bumbo” had been served “in South Africa,” “sometime in
 3 October,” but refused to give any details regarding when and how the service had
 4 been effected, or even the exact date on which service had allegedly been effected.
 5 (*Id.* at ¶5.) C & F confirmed with Bumbo (Pty) Limited that service had not been
 6 effected in South Africa in October or at any other time. (Johnston Decl., ¶3.)

7 On December 19, 2007, C & F was retained to defend Bumbo (Pty) Limited
 8 in both this matter and the action entitled, *Wendy D. Whitson v. Bumbo, et al.*, Case
 9 No. 07-05597, also pending in this Court. After learning that a default based upon
 10 a defective affidavit had been entered against Bumbo (Pty) Limited in the *Whitson*
 11 matter, C & F filed a motion to set aside the default, quash service, dismiss for
 12 insufficiency of service of process and lack of personal jurisdiction and for
 13 sanctions due to plaintiffs’ vexatious and unreasonable conduct. This motion is set
 14 for hearing on February 21, 2008.

15 C & F subsequently learned that in the *Lamm* case, plaintiffs filed an
 16 affidavit of service claiming that they had effected service on “Bumbo Limited” by
 17 serving “Mark Buchanan” as “owner” in Conroe, Texas on December 27, 2007.
 18 C & F attempted to obtain information about the purported service and learned that
 19 the summons and complaint were delivered to Wartburg Enterprises, Inc. (*Id.* at
 20 ¶9.)

21 After learning of the defective Affidavit filed in the *Lamm* case, C & F sent
 22 yet *another* letter to plaintiffs’ attorneys advising that neither Wartburg
 23 Enterprises, Inc. nor Mark Buchanan was authorized to accept service of process
 24 on behalf of Bumbo (Pty) Limited and requesting that they immediately withdraw
 25 their Affidavit. Plaintiffs’ attorneys have not responded to this letter nor have they
 26 withdrawn their Affidavit as of the date of the filing of this motion. (Johnston
 27 Decl., ¶12; See Exhibit “E” to Johnston Decl.)

ISSUES TO BE DECIDED

1. Did plaintiffs properly serve process on Bumbo (Pty) Limited by personally serving the summons and complaint, on behalf of a non-existent defendant, at the address of a Texas facility of a Florida corporation which serves as a distributor for the Bumbo Baby Sitter, when said corporation does not serve as officer, director, employee, or agent for service of process of Bumbo (Pty) Limited?
2. Are there sufficient contacts between Bumbo (Pty) Limited, a South African corporation with no offices, property or employees in the United States and the state of California to satisfy the constitutional requirements for the exercise of personal jurisdiction over Bumbo (Pty) Limited in this venue?
3. Did plaintiffs and their attorneys engage in sanctionable, bad faith conduct by refusing to provide Bumbo (Pty) Limited's attorneys with any information regarding service and filing a defective affidavit of service when plaintiffs' attorneys had repeatedly been given evidence that said affidavit was defective?

STANDARD

Federal Rule 12(b)(5) permits a challenge to the method of service attempted by plaintiffs. If a Rule 12(b)(5) motion is granted, the court may dismiss the action. *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2^d Cir. 1985).

Under Rule 12(b)(2), a defendant may be dismissed from an action if the court determines that it does not have personal jurisdiction over the defendant. Again, although defendant is the moving party on the motion to dismiss, plaintiff is the party who invoked the court's jurisdiction. Therefore, plaintiff bears the burden of proof on the necessary jurisdictional facts; *e.g.*, the existence of "minimum contacts" between defendant and the forum state. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002).

1 Finally, Section 1927 of the United States Code provides that “any attorney
2 or other person admitted to conduct cases in any court of the United States or any
3 Territory thereof who so multiplies the proceedings in any case unreasonably and
4 vexatiously may be required by the court to satisfy personally the excess costs,
5 expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28
6 U.S.C. §1927.

7 ARGUMENT

8 I.

9 **BUMBO (PTY) LIMITED SHOULD BE DISMISSED AS** 10 **PLAINTIFFS HAVE FAILED TO EFFECT SERVICE OF** 11 **PROCESS ON BUMBO (PTY) LIMITED**

12 Plaintiffs’ attempted service of the summons and complaint on Bumbo (Pty)
13 Limited was defective, and Bumbo (Pty) Limited should be dismissed pursuant to
14 Federal Rule of Civil Procedure 12(b)(5).

15 An individual defendant, or in some cases, an entire action, may be
16 dismissed when a plaintiff fails to properly serve the summons and complaint.
17 *Marshall v. Warwick*, 155 F.3d 1027, 1030 (8th Cir. 1998).

18 The Federal Rules of Civil Procedure pertaining to service upon foreign
19 corporations provide that service shall be made upon a domestic or foreign
20 corporation “by delivering a copy of the summons and of the complaint to an
21 officer, a managing or general agent, or to any other agent authorized by
22 appointment or by law to receive service of process.” *Fed. R. Civ. Proc.* 4(h)(1).

23 Unless a plaintiff properly serves a defendant with the summons and
24 complaint, the court lacks personal jurisdiction over that defendant. *Jackson v.*
25 *Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982). Neither actual notice of the
26 complaint, nor simply naming the defendant in the caption, subjects a defendant to
27

1 personal jurisdiction absent service that complies with Rule 4. *Ibid.*

2 In the case at hand, there are numerous problems with plaintiffs' alleged
3 service of process on Bumbo (Pty) Limited. The Affidavit of Service filed with
4 this Court states that "Mark Buchanan" was served as "Owner" for "Bumbo
5 Limited." (See Affidavit, *supra.*) However, as discussed above, Bumbo (Pty)
6 Limited has no knowledge, ownership or control of a business entity called
7 "Bumbo Limited." In fact, to Bumbo (Pty) Limited's knowledge, "Bumbo
8 Limited" does not exist.⁶

9 Further, as discussed above, Mark Buchanan is not an "owner" of Bumbo
10 (Pty) Limited. Mark Buchanan also is not an officer, director, managing agent or
11 employee of Bumbo (Pty) Limited. Bumbo (Pty) Limited has no office or place of
12 business at 12248 FM 1485, Conroe, Texas. Mark Buchanan further is not
13 authorized to accept service on behalf of Bumbo (Pty) Limited.

14 Finally, because Wartburg Enterprises, Inc. is not an agent for service of
15 process for Bumbo (Pty) Limited, service upon Wartburg Enterprises, Inc. does not
16 amount to effective service on Bumbo (Pty) Limited. Wartburg Enterprises, Inc.'s
17 only connection to Bumbo (Pty) Limited is that Wartburg Enterprises, Inc. is one
18 of multiple distributors of the "Baby Sitter." The two companies are incorporated
19 in different countries, run separate operations and exist independently of each
20 other. Each has its own employees and its own independent headquarters.

21 Service of process should be quashed and Bumbo (Pty) Limited should be
22 dismissed from this action due to plaintiffs' failure to properly serve the summons
23 and complaint.

24 //

25 _____
26 ⁶ Interestingly, in the *Whitson* matter, Mark Buchanan's wife, Dione Buchanan was served as
27 "owner" of "Bumbo", another non-existent business entity. It appears that plaintiffs' counsel
28 have not done their homework and are planning to continue serving Wartburg-related individuals
as "owners" of different Bumbo-related names until they somehow effect service by process of
elimination.

II.

THIS COURT CANNOT EXERCISE *IN PERSONAM*

JURISDICTION OVER BUMBO (PTY) LIMITED

There are two limitations on the court's power to exercise personal jurisdiction over a nonresident defendant: (1) the applicable state or federal personal jurisdiction statute and (2) constitutional principles of due process. *Sher v. Johnson*, 911 F.2d 1357, 1360 (9th Cir. 1990). Where, as is the situation here, there is no applicable federal statute governing personal jurisdiction, the law of the state in which the district sits applies. *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). Because California's long-arm statute allows courts to exercise personal jurisdiction to the extent permitted by the Due Process Clause of the United States Constitution, this Court need only determine whether personal jurisdiction in this case would meet the requirements of due process. *Id.*; see *Cal. Code Civ. Proc.* § 410.10.

The Due Process Clause mandates that a nonresident defendant must have sufficient minimum contacts with the forum state such that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 838 (9th Cir. 1986). The defendant's conduct and connection with the forum must be such that the defendant should reasonably anticipate being haled into court there. *Sher, supra*, 911 F.2d at 1361, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Defendant is entitled to protection from suits based on "random, fortuitous, or attenuated" contacts with the chosen forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

The constitutional standard may be satisfied in one of two ways: through general jurisdiction or specific jurisdiction. The burden of showing the existence of personal jurisdiction is on the party seeking to invoke the court's jurisdiction.

1 *Amba Marketing Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977).
 2 To establish a prima facie case, plaintiff must produce admissible documentary
 3 evidence containing facts sufficient to support a finding of personal jurisdiction.
 4 *Sher v. Johnson, supra*, 911 F.2d at 1361.

5 A foreign defendant receives deference when determining whether the acts
 6 of the defendant have a substantial enough connection with the forum state to make
 7 the exercise of jurisdiction over the defendant reasonable due to its status as a
 8 foreign company. *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1275-76 (6th
 9 Cir. 1998). “The unique burdens placed upon one who must defend oneself in a
 10 foreign legal system should have significant weight in assessing the reasonableness
 11 of stretching the long arm of personal jurisdiction over national borders.” *Asahi*
 12 *Metal Indust. Co. v. Superior Court of California*, 480 U.S. 102, 114 (1987).

13 **A. Plaintiffs Cannot Show That Bumbo (PTY) Limited Has the Requisite**
 14 **Minimum Contacts with California to Justify General Jurisdiction**

15 General jurisdiction exists if the nonresident’s contacts with the forum are
 16 continuous and systematic and the exercise of jurisdiction satisfies traditional
 17 notions of fair play and substantial justice. *Ziegler v. Indian River County*, 64 F.3d
 18 470, 473 (9th Cir. 1995). If general jurisdiction exists, the court has jurisdiction
 19 over the defendant even if the cause of action is unrelated to the defendant’s forum
 20 activities. *Omeluck v. Langsten Slip & Batbygerri A/S*, 52 F.3d 267, 270 (9th Cir.
 21 1995).

22 Plaintiffs cannot establish sufficient minimum contacts for general
 23 jurisdiction. Bumbo (Pty) Limited is a private company which is organized under
 24 the laws of South Africa and has its principal place of business in Pretoria, South
 25 Africa. (*Buitendach Decl.*, ¶4.) A number of facts establish lack of jurisdiction.
 26 For example:

- 27 • Bumbo (Pty) Limited does not now have and never has had any

office, warehouse or manufacturing facility in California;

- Bumbo (Pty) Limited does not now have and never has any employees in the state of California;
- Bumbo (Pty) Limited does not now and never has had a business license in California;
- Bumbo (Pty) Limited does not now own and never has owned any real or personal property in California;
- Bumbo (Pty) Limited does not now maintain and never has maintained a bank account in California;
- Bumbo (Pty) Limited does not now have and never has had a California telephone number;
- Bumbo (Pty) Limited does not now have and never has had a mailing address in California;
- Bumbo (Pty) Limited has never paid any taxes in California;
- Bumbo (Pty) Limited has never conducted any meetings of its board of directors in California;
- Bumbo does not maintain a sales force in California;
- Bumbo (Pty) Limited does not now advertise and has never advertised in California;
- Bumbo (Pty) Limited does not now have and never has had any agents for service of process in California;
- Bumbo (Pty) Limited does not now and never has had any distributors in California authorized to accept service of process on behalf of Bumbo.

(Buitendach Decl.)

Based on the above facts, Bumbo (Pty) Limited does not have the

continuous and systemic contacts courts require when determining whether the exercise of jurisdiction satisfies traditional notions of fair play and substantial justice. *Ziegler, supra*, 64 F.3d at 473. The absence of substantial contacts with California is sufficient for Bumbo (Pty) Limited to successfully challenge the exercise of general jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

B. This Court Cannot Assert Specific Jurisdiction Over Bumbo (Pty) Limited

The Ninth Circuit applies a three-part test in determining whether it may assert specific jurisdiction over a defendant:

- the defendant must perform an act or consummate a transaction within the forum, purposefully availing itself of the privilege of conducting activities in the forum and invoking the benefits and protections of its laws;
- the claim must arise out of or result from the defendant's forum-related activities; *and*
- the exercise of jurisdiction must be reasonable.

Rano v. Sipa Press, Inc., 987 F.2d 580, 301 (9th Cir. 1993).

The determination of specific jurisdiction is a conjunctive test which “turns on an evaluation of the nature and quality of defendant’s contacts in relation to the cause of action.” *Data Disc., Inc. v. Sys. Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). The party asserting jurisdiction has the burden of proof once the issue is raised. *Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1522 (9th Cir. 1983).

“With respect to goods and services in the international marketplace, the mere placement of a product into the stream of commerce is not necessarily sufficient to establish jurisdiction.” *VCS Samoa Packing Co. v. Blue Continent*

1 *Products (PTY) Ltd.*, 83 F. Supp. 2d 1151, 1154 (S.D. Cal. 1998), citing *World-*
 2 *Wide Volkswagen Corp.*, *supra*, 444 U.S. at 297-298. “Defendant’s awareness that
 3 the stream of commerce may or will sweep the product into the forum State does
 4 not convert the mere act of placing the product into the stream into an act
 5 purposefully directed toward the forum State.” *Asahi Metal Ind. v. Sup. Ct.*, 480
 6 U.S. 102, 112 (1987). “Moreover, indirect or attenuated contacts or the unilateral
 7 activity of a third party will not support the exercise of specific jurisdiction since it
 8 cannot be said that defendant purposely availed himself of the benefits of the
 9 forum.” *VCS Samoa Packing Co.*, *supra*, 83 F. Supp. 2d at 1154, citing, *Keeton v.*
 10 *Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984).

11 In the case of *Felix v. Bomoro Kommanditgesellschaft*, 196 Cal. App. 3d 106
 12 (1987), the court found that “the degree to which a foreign corporation interjects
 13 itself into the forum state directly affects the fairness of subjecting it to
 14 jurisdiction. The smaller the element of purposeful interjection, the less is
 15 jurisdiction to be anticipated and the less reasonable is its exercise.” *Id.* at 115.
 16 “Additional conduct of the defendant may indicate an intent or purpose to serve the
 17 market in the forum State, for example, designing the product for the market in the
 18 forum state, advertising in the forum State, establishing channels for providing
 19 regular advice to customers in the forum State” *Id.* at 116, quoting, *Asahi*
 20 *Metal Ind.*, *supra*, 480 U.S. at 112.

21 Applying these principles to the instant case, it would be manifestly unjust to
 22 require Bumbo (Pty) Limited to defend against plaintiffs’ suit in California.
 23 Bumbo (Pty) Limited is incorporated in South Africa and is not licensed to do
 24 business in California. Bumbo (Pty) Limited has no office, affiliate, subsidiary,
 25 employee, agent, bank accounts or business operations in the state. The only
 26 possible contact that Bumbo (Pty) Limited could be said to have with California is
 27 by way of the fact that Target, a Minnesota corporation, has retail stores in
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California that sold the Baby Sitter. The product itself, however, is manufactured in South Africa. It was not designed specifically for the California market. In this case, the finished product was sold and distributed by Target, not Bumbo (Pty) Limited. Target is a corporation that has stores located nationwide, not just in California. Bumbo (Pty) Limited has not advertised, solicited any business, or otherwise sought to serve any particular market in this state. The extent to which Bumbo (Pty) Limited could reasonably anticipate being involved in litigation in California was minimal at best.

III.

THE COURT SHOULD IMPOSE SANCTIONS BECAUSE PLAINTIFFS' ATTORNEYS HAVE ACTED UNREASONABLY AND VEXATIONOUSLY IN FORCING BUMBO (PTY) LIMITED TO EXPEND UNECESSARY COSTS AND FEES IN SEEKING TO DISMISS THIS ACTION BASED UPON A KNOWINGLY FRAUDULENT PROOF OF SERVICE

Section 1927 of the United States Code provides that “any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably or vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. §1927. “Sanctions may be imposed under Section 1927 where an attorney engaged in conduct in bad faith, with improper motive, or a reckless disregard of a duty owed to the court.” *Landis Revin Nutraceuticals, supra*, 2007 WL at *5, citing *New Alaska Develop. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989).

A federal court also has inherent power to impose sanctions against both attorneys and parties for “bad faith” conduct in litigation, even if the conduct is sanctionable under other rules such as Federal Rule of Civil Procedure 11 or

1 Section 1927. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). “Bad faith”
 2 conduct includes findings that a lawyer or party “acted in bad faith, vexatiously,
 3 wantonly or for other oppressive reasons.” *Id.* at 45-46. Recklessness combined
 4 with other factors such as frivolousness, harassment or an improper purpose, may
 5 constitute bad faith, warranting sanctions under a court’s inherent powers. *B.M.K.*
 6 *v. Maui Police Dep’t*, 276 F.3d 1091, 1106 (9th Cir. 2002). The Supreme Court has
 7 found that sanctions under the court’s inherent power are *particularly appropriate*
 8 for fraud practiced upon the court. *Chambers, supra*, 501 U.S. at 54. “Fraud on
 9 the court” involves an “unconscionable plan or scheme which is designed to
 10 improperly influence the court in its decision.” *Pumphrey v. K.W. Thompson Tool*
 11 *Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995).

12 In the *Landis Revin Nutraceuticals* case, the court found that counsel for
 13 plaintiff had engaged in “bad faith conduct or, at a minimum, reckless conduct in
 14 disregard of his duties owed to the court, which unnecessarily and unreasonably
 15 multiplied these proceedings.” *Landis Revin Nutraceuticals, supra*, 2007 WL at
 16 *5. Similar to the case at hand, in *Landis Revin Nutraceuticals*, defendants
 17 asserted that they were never served with the summons and complaint. Plaintiffs’
 18 counsel alleged that defendants were served by registered mail and filed Requests
 19 for Entry of Defaults against all defendants. When contacted by counsel for
 20 defendants, plaintiffs’ counsel then refused to produce copies of the return receipts
 21 allegedly signed by defendants, instead contending that his proofs of service alone
 22 evidenced service. Counsel also refused to set aside the defaults. Defendants then
 23 brought a Motion to Set Aside the Defaults, which was granted. Further, the court
 24 ordered plaintiffs’ counsel to pay sanctions in the amount of \$10,716 to defendants
 25 for the attorney’s fees incurred in setting aside the defaults. *Landis, supra*, 2007
 26 WL 397144.

27 In the case at issue, plaintiffs’ attorneys have also acted in bad faith,
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practiced fraud upon the Court, and have unreasonably multiplied the hearings as well as the costs and fees expended in this action. Plaintiffs' attorneys have been aware at least since November 2007 that Bumbo (Pty) Limited had retained monitoring counsel in California. Plaintiffs' attorneys have received repeated communications from California attorneys advising them that Bumbo (Pty) Limited had not received service of process. Plaintiffs' attorneys have also unabashedly refused to cooperate on this issue in any way with defense attorneys.⁷ In spite of receiving a letter from C & F advising that, contrary to the assertions made in the Affidavit of Service, "Mark Buchanan" is not the owner of "Bumbo Limited" and that Wartburg Enterprises, Inc. was not authorized to accept service of process on behalf of Bumbo (Pty) Limited, plaintiffs' attorneys still unreasonably refused to withdraw their Affidavit.⁸ Thus, plaintiffs' attorneys unreasonably and vexatiously created the need for Bumbo (Pty) Limited to bring this motion.⁹

Plaintiffs' conduct of filing an affidavit that they *knew* to be defective due to numerous communications from defense counsel, without even the courtesy of notifying opposing counsel, is highly questionable and has only served to multiply the proceedings in this case. These actions represent precisely the kind of vexatious conduct contemplated by 28 U.S.C. §1927. Bumbo (Pty) Limited has incurred \$2,820 in bringing this motion. (*Johnston Decl.*, ¶17.) Therefore, Bumbo (Pty) Limited requests that this Court impose sanctions against plaintiffs and their

⁷ Evidence of this fact can be seen most prominently in the letter from Mr. Edgar to C & F dated November 21, 2007 (attached as *Exhibit "C"* to *Johnston Decl.*) in which Edgar advises that "you all do whatever you all need to do to represent your clients. At this time, we respectfully decline to enter into any agreement(s) set forth in your letter of November 15, 2007."

⁸ It should also be noted that a motion to dismiss was filed on December 28, 2007 regarding the extremely similar affidavit filed in the *Whitson* action.

⁹ Since defense counsel has had very few interactive communications with plaintiffs' counsel, it is unclear whether plaintiffs themselves have had any role in the above-referenced decisions regarding the service issues. Thus, defense counsel has no choice but to request sanctions against plaintiffs as well as their counsel.

attorneys in the amount of \$2,820.

CONCLUSION

By this motion, Bumbo (Pty) Limited seeks two forms of relief:

- that the claimed service of process, served upon an unrelated corporation, be quashed; and
- that any claim against Bumbo (Pty) Limited be dismissed as this Court cannot exercise personal jurisdiction over it.

Further, Bumbo (Pty) Limited seeks sanctions against plaintiffs and their attorneys in the amount of \$2,820 for their fraudulent and unreasonable conduct in this action.

The facts are clear: Plaintiffs have served an unrelated entity of behalf of an entity which does not exist. Bumbo (Pty) Limited has not been served in this action, has not appeared in this action and does not have any contacts, let alone constitutionally required minimum contacts, with this forum state. Further, plaintiffs and their attorneys are solely responsible for the costs, expenses and attorneys' fees reasonably incurred due to their unreasonable and unnecessary conduct.

Dated: January __, 2008

CONDON & FORSYTH LLP

By: s/Jennifer J. Johnston
ROD D. MARGO
JENNIFER J. JOHNSTON

Attorneys for *Specially Appearing*
Defendant
BUMBO (PTY) LIMITED